

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

MARYLAND CASUALTY COMPANY, et
al.,

Plaintiffs,

v.

TRANSPORTATION INSURANCE
COMPANY, et al.,

Defendants.

2:08-CV-01040-LRH-LRL

ORDER

Presently before the court is Plaintiffs Maryland Casualty Company and Assurance Company of America's (collectively "Plaintiffs") Motion to Remand (#10¹). Defendants Transportation Insurance Company, Valley Forge Insurance Company, Continental Insurance Company and Transcontinental Insurance Company (collectively "Defendants") have filed an opposition (#13) to which Plaintiffs replied (#15).

I. Facts and Procedural History

This is an insurance dispute arising out of a construction defects matter previously litigated in the State of Nevada District Court. Plaintiffs and Defendants are issuers of insurance policies. Plaintiffs issued commercial general liability insurance to the developer and the general contractor

¹ Refers to the court's docket entry number.

1 involved in the previously litigated construction defects matter and incurred the costs of their
2 defense in the case. Defendants issued commercial general liability insurance to various
3 subcontractors implicated by the claims in the construction defects matter.

4 The dispute now before the court concerns “additional dispute endorsements”² entered into
5 by Defendants that added the developer and the general contractor as additional insureds to the
6 subcontractors’ insurance policies held by Defendants. The endorsements allegedly state that the
7 coverage provided to the additional insureds is “excess” if there is other valid and collectible
8 insurance available to the additional insureds. Defendants maintain they accepted the developer
9 and general contractor’s “tender of defense”³ under these endorsements on an “excess basis.” Thus,
10 it appears Defendants agreed to provide costs associated with defending the developer and general
11 contractor only to the extent that such costs were in excess of amounts covered by other insurance
12 companies.

13 In determining their liability in the construction defects dispute, Defendants allegedly
14 concluded, “[W]hile obligations were owed to additional insureds [, the developer and the general
15 contractor,] to defend and indemnify, the obligations were excused due to other insurance clauses
16 [that] made the policies [Defendants] issued excess to other available coverage.” (Compl. (#1), ¶
17 10.) Accordingly, Defendants declined to “provide a defense” to the developer and the general
18 contractor in the construction defects matter and refused to contribute to the defense fees and costs.
19 (*Id.*) As a result, Plaintiffs incurred all of the defense fees and costs on behalf of the developer and
20 general contractor.

21 Plaintiffs now seek a “judicial determination of . . . the parties[’] . . . rights, duties and
22 obligations with regard to this dispute.” (*Id.*, ¶ 21.) Plaintiffs also seek “contribution” and
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24 ² An “additional insured endorsement” is a contract by which an additional insured (a person or entity
other than the named insured) is protected by a particular insurance policy.

25 ³ A “tender of defense” is an act by which one party transfers the obligation of providing a defense and
26 any possible indemnification to the party to whom the tender was made.

1 “reimbursement” from Defendants in the sum of Defendants’ equitable share of the defense fees
2 and costs Plaintiffs incurred in defending the construction defects matter.

3 On August 11, 2008, Defendants filed a notice of removal of their case from the Eighth
4 Judicial District Court of the State of Nevada (#1), claiming removal is appropriate on the basis of
5 diversity jurisdiction. Plaintiffs now move this court to remand the case.

6 **II. Discussion**

7 “[A]ny civil action brought in a State court of which the district courts of the United States
8 have original jurisdiction, may be removed by the defendant . . . to the district court of the United
9 States for any district . . . where such action is pending.” 28 U.S.C. § 1441(a). Among other
10 reasons, the district courts of the United States have “original jurisdiction” where there is diversity
11 of citizenship between the parties and the amount in controversy, exclusive of interest and costs,
12 exceeds \$75,000. 28 U.S.C. § 1332(a).

13 “If . . . it appears that the district court lacks subject matter jurisdiction, the case shall be
14 remanded.” 28 U.S.C. § 1447(c). “Federal jurisdiction must be rejected if there is any doubt as to
15 the right of removal in the first instance.” *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992)
16 (*citing Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1064 (9th Cir. 1979)). Moreover, the
17 removal statute is construed restrictively and in favor of remanding a case to state court. *See*
18 *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941); *Gaus*, 980 F.2d at 566.

19 After a defendant files a petition for removal, the court must determine whether federal
20 jurisdiction exists, even if no objection is made to removal. *See Rains v. Criterion Systems, Inc.*,
21 80 F.3d 339, 342 (9th Cir. 1996). The defendant always has the burden of establishing that
22 removal is proper. *Gaus*, 980 F.2d at 566. Normally this burden is satisfied if the plaintiff claims a
23 sum greater than the jurisdictional requirement. *Id.*

24 However, if the plaintiff does not claim a sum greater than the jurisdiction requirement, the
25 defendant cannot meet its burden by merely alleging that the amount in controversy is met:
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1 The authority which the statute vests in the court to enforce the limitations of its
 2 jurisdiction precludes the idea that jurisdiction may be maintained by mere averment or
 3 that the party asserting jurisdiction may be relieved of his burden by any formal
 4 procedure. If his allegations of jurisdictional facts are challenged by his adversary in any
 5 appropriate manner, he must support them by competent proof. And where they are not
 6 so challenged the court may still insist that the jurisdictional facts be established or the
 7 case be dismissed, and for that purpose the court may demand that the party alleging
 8 jurisdiction justify his allegations by a preponderance of evidence.

9 *Id.* (quoting *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)) (emphasis
 10 omitted). This preponderance-of-the-evidence analysis encompasses whether it is “‘facially
 11 apparent’ from the complaint that the jurisdictional amount is in controversy.” *See Singer v. State*
 12 *Farm Mut. Auto. Ins.*, 116 F.3d 373, 377 (9th Cir. 1997) (delineating the “appropriate procedure for
 13 determining the amount in controversy on removal” as described in *Allen v. R & H Oil & Gas Co.*,
 14 63 F.3d 1326 (5th Cir. 1995)). “When the amount is not facially apparent from the complaint, the
 15 court may consider facts in the removal petition and may require parties to submit summary-
 16 judgment-type evidence relevant to the amount in controversy at the time of removal.” *Kroske v.*
 17 *U.S. Bank Corp.*, 432 F.3d 976, 980 (9th Cir. 2006) (internal quotation marks omitted).

18 After review of the complaint and Defendants’ petition for removal, the court finds that it
 19 requires more evidence to determine whether it has subject matter jurisdiction over this case.⁴ In
 20 arguing that the amount in controversy requirement has been satisfied, Defendants note “the
 21 number of homes at issue in the [u]nderlying [a]ctions, the number of liability policies at issue (5 or
 22 6) and costs typically incurred by developers and/or general contractors in multi-party construction
 23 defect litigation involving residential developments” (Defs. Notice of Removal (#1) at 3.)
 24 However, Defendants have failed to provide any factual evidence supporting their belief that the

25 ⁴ The court recognizes that in their motion to remand Plaintiffs do not appear to challenge the diversity
 26 of citizenship requirements. Instead, Plaintiffs urge the court to decline to exercise jurisdiction over this matter
 pursuant to the discretion afforded by the Declaratory Judgment Act. However, to hear a claim under the Act,
 there must be an independent basis for the court's jurisdiction. *Am. Cas. Co. v. Krieger*, 181 F.3d 1113, 1118
 (9th Cir. 1999). Accordingly, the court must first determine whether the court possesses jurisdiction before
 considering whether it should exercise its discretion and dismiss the action under the Act. Once Defendants
 establish jurisdiction, the court will consider whether entertaining the action is appropriate.

1 amount in controversy exceeds \$75,000. The court has before it virtually no information or
2 evidence relating to the issues involved in the underlying state court action, the disputed insurance
3 policies, or the costs of the defense over which this dispute centers.⁵ Without such information, the
4 court cannot determine whether the amount in controversy exceeds \$75,000.

5 Jurisdiction will exist if Defendants can present “summary-judgment-type evidence” to
6 establish by a preponderance of the evidence that this case meets § 1332(a)’s amount in controversy
7 requirement. Consequently, Defendants have twenty (20) days to present evidence to establish by a
8 preponderance of the evidence that the matter in controversy exceeds \$75,000. Plaintiffs are
9 granted ten (10) days to file an opposition. No reply is required.

10 IT IS THEREFORE ORDERED that Defendants are granted twenty (20) days to establish
11 the minimum amount in controversy for federal jurisdiction. Plaintiffs are granted ten (10) days to
12 file an opposition. No reply is required.

13 IT IS SO ORDERED.

14 DATED this 20th day of May, 2009.



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17 LARRY R. HICKS
UNITED STATES DISTRICT JUDGE

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24 ⁵ Plaintiffs have attached to their motion to remand briefs in a state court proceeding involving some
25 of the plaintiffs and defendants now before the court. While it appears from these briefs that the dispute in state
26 court also involved an underlying construction defects lawsuit and similar insurance contract interpretation
issues, it is not clear how the issues before the state court in that case relate to the case now pending before this
court.